



# BOARD OF INQUIRY (*Human Rights Code*)

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IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaints by Mike Naraine dated May 24, 1985 and October 24, 1985, alleging discrimination in employment on the basis of race, colour, place of origin and ethnic origin by Ford Motor Company of Canada Ltd., Gord Batstone, George Goyton, Andy Barr, W.H. Dobson, Bob Darrogon and Mike Teighe.

## B E T W E E N :

Mike Naraine

**Complainant**

- and -

Ford Motor Company of Canada Ltd.

Gord Batstone

George Goyton

Andy Barr

W.H. Dobson

Bob Darrogon

Mike Teighe

**Respondents**

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## INTERIM DECISION

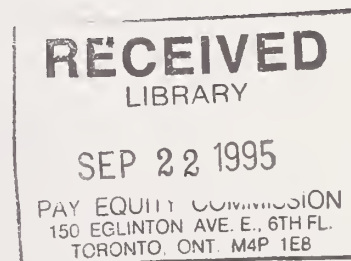
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Adjudicator : Professor Constance Backhouse

Date : September 14, 1995

Board File No: 93-0035

Decision No : 95-042-I





IN THE MATTER OF a Board of Inquiry  
appointed pursuant to s.38(1) of the  
*Human Rights Code*, R.S.O. 1990, c.H.19

BETWEEN

MIKE NARAINÉ

Complainant

- and -

FORD MOTOR COMPANY OF CANADA LTD.,  
GORD BATSTONE, GEORGE GOYTON, ANDY BARR, W.H. DOBSON,  
BOB DARROGON AND MIKE TEIGHE

Respondents

Date of Complaints: 24 May 1985 and 24 October 1985

Date of Decision: 14 September 1995

Board of Inquiry: Professor Constance Backhouse

Counsel: Counsel for the Commission:  
Naomi Overend, Kikee Malik, Margaret Best

Counsel for Respondents:  
Russell Juriansz, Anne Irwin

### INTERIM DECISION, No. 3

This complaint involves a claim by Mike Naraine that his right to equal treatment with respect to employment has been infringed because of his race, colour, place of origin and ethnic origin, contrary to section 4(1), 4(2), 7, 8 and 10 of the *Human Rights Code*, R.S.O. 1990, c.H.19.

#### **Motion for Adjournment Resulting from Non-Disclosure of Witness Statements to the Complainant**

At the outset of this hearing, the complainant, Mr. Naraine, was represented by separate counsel. His counsel participated in the various preliminary motions which preceded the hearing on the merits. At the beginning of the hearing into the substantive issues of the case, Mr. Naraine announced that due to financial difficulties he would no longer be represented by separate counsel but would rely upon counsel for the Ontario Human Rights Commission to present the case.

The hearing into the merits of the case proceeded on this basis and the Commission's case-in-chief came to a conclusion on 28 June 1995. The proceedings were then adjourned until 2 August 1995, when the respondents were scheduled to begin presenting their defence.

Upon the resumption of the hearing on 2 and 3 August 1995, the respondents advised that they intended to call five witnesses. Before any of these witnesses could be called, Mr. Naraine advised the Board of Inquiry that respondents' counsel had failed to provide him in advance with any disclosure or overview of the evidence of these witnesses. Counsel for the respondents advised the Board that their law office had indeed neglected to provide Mr. Naraine with such disclosure, and noted that all disclosure documents had been delivered to Commission counsel. Respondents' counsel stated that it was her understanding that when Mr. Naraine discharged his lawyer, he had agreed to have his interests represented by Commission counsel. Commission counsel noted that she had received disclosure of "will-say" statements for the scheduled witnesses from respondents' counsel's office two days previously, on 31 July 1995. She advised the Board that she had not had sufficient time to forward these documents to Mr. Naraine herself.

The failure to provide the disclosure documents to Mr. Naraine is a matter of some procedural concern. Although respondents' counsel suggested that she was under the impression that Mr. Naraine had accepted Commission counsel as his own, this is obviously incorrect. It is clear that the Commission and Mr. Naraine represent two separate parties to this proceeding, and it is wrong to suggest that counsel for the Commission can ever represent the interests of a private complainant. Counsel for the Commission is charged solely with representing the public body of the Ontario Human Rights Commission. As such, even though individual complainants may from time to time rely upon lawyers from the Commission to argue their cases, Commission counsel cannot be taken to "represent" individual complainants in any sense of that word. The respondents' failure to serve Mr. Naraine with these documents was clearly an error. Mr. Naraine has the right to be accorded full participatory rights as an individual party to these proceedings. All parties to a proceeding must be properly served with documents in accordance with the principles of natural justice and pursuant to the rules of the Board of Inquiry.

Furthermore, it is clear that at earlier points in this hearing, respondents' counsel recognized and acknowledged the potential divergence of interest between the Commission and the complainant. When the Commission made its submissions regarding remedy, respondents' counsel insisted that Mr. Naraine be required to stipulate that he had no objection to the Commission's submissions concerning the amount of compensation being sought. While Mr. Naraine was on the stand, respondents' counsel informed the Board that they were hampered in their ability to make legal argument about the admissibility of certain evidence with Mr. Naraine in the room. Conceding that Mr. Naraine, as a separate party, had a right to be in the room, respondents' counsel expressed concern that hearing the legal argument might influence Mr. Naraine's subsequent testimony. At that point, Mr. Naraine volunteered to absent himself from the hearing for the duration of the legal argument in order not to prejudice respondents' counsel's position. At these points in the hearing at least, respondents' counsel recognized that Mr. Naraine was himself a party to the proceeding.

The respondents' failure to serve the complainant with the disclosure documents in a timely manner created significant difficulties. Mr. Naraine's first opportunity to review the disclosure materials was on the morning of the resumption of the hearing on 2 August 1995. Upon reviewing these documents, he expressed grave concern and immediately advised the Board that he intended to obtain separate legal counsel to represent him personally before this Board of Inquiry.



### **Proposal to Deal With Non-Disclosure Without Adjourning the Hearing**

Neither Commission counsel nor Mr. Naraine wished to hold up the proceeding by waiting to resume until Mr. Naraine had retained separate counsel. They suggested that this Board proceed with the evidence of the witnesses that the respondents intended to call on August 2nd and 3rd, complete their examinations-in-chief, and reserve cross-examination for a later date in the hearing when Mr. Naraine's counsel could be present.

Respondents' counsel objected to proceeding with successive examinations-in-chief of her witnesses. She argued that once Mr. Naraine retained counsel, his counsel would surely object that he had not been able to hear the evidence-in-chief. Mr. Naraine replied that he was prepared to waive his right to object to proceeding in this manner. He noted that he would attempt to obtain copies of the transcripts in an expeditious manner, and his counsel would have the benefit of the reading the direct examinations from the transcripts before proceeding with cross-examination.

Respondents' counsel next argued that it was preferable to have the direct examination of a witness followed immediately by cross-examination. She argued that having these "back to back" was important procedurally. While this is undoubtedly true, it is also the case that this hearing has proceeded with a series of adjournments and large gaps of time between the giving of direct evidence and the cross-examination of the majority of the witnesses who testified for the Commission. Indeed, the gaps of time between direct examination and cross-examination of some witnesses were so lengthy that respondents' counsel often had the benefit of complete transcripts of the testimony-in-chief when undertaking cross-examination. As such, this alone does not appear to be sufficient reason for granting the motion to adjourn.

Respondents' counsel's next argument was that separating testimony-in-chief from cross-examination placed her clients at a procedural disadvantage. She claimed that matters raised in the cross-examination of one witness could often be addressed by the subsequent witnesses when they were called to give direct evidence. Further, she claimed that Commission counsel would have the opportunity to hear the testimony-in-chief of several of the respondents' witnesses before having to cross-examine. Commission counsel would thus be able to confront some of the earlier witnesses

with testimony that would not have been available if they had been cross-examined immediately following their testimony-in-chief.

In response, Commission counsel disagreed that this would provide Commission counsel with any significant procedural advantage. She also pointed out that as she understood it, the first witnesses scheduled would be giving evidence on matters which were quite distinct from each other. She argued that their evidence did not overlap in any material way, and consequently there would be no actual or potential prejudice to the respondents in proceeding with the examinations-in-chief. Respondents' counsel conceded that the witnesses she intended to call on August 2nd would be testifying about different incidents. She also indicated that she might be able to alter the order of the witnesses she intended to call on August 3rd so that there would be no significant overlap in the evidence given, thus minimizing the likelihood that any purported advantage would accrue to the Commission or the complainant.

### **Delays in the Hearing**

The hearing into this human rights complaint has been lengthy and difficult. Professor Robert Kerr was originally appointed as a Board of Inquiry on 5 February 1993. Due to his serious illness, an illness which ultimately led to his death, he resigned prior to commencing the hearing on 14 October 1993. I was appointed to step in to chair this Board of Inquiry on 15 November 1993. The hearing had originally been scheduled by Professor Kerr to commence in December 1993, and the initial intent was to begin the hearing as scheduled. However, respondents' counsel had an automobile accident which prevented attendance in December, and new counsel was ultimately retained, resulting in more delay. The initial commencement of the hearing was set over to 22 February 1994. Preliminary submissions were heard in four days of hearing in February and March 1994. The Board of Inquiry's initial ruling on the preliminary matters was released on 21 April 1994. Due to the unavailability of counsel, the hearing on the merits was not set to resume until January 1995.

The respondents next sought judicial review of the preliminary ruling in the Divisional Court, which issued an interim stay on the proceedings. The Divisional Court upheld the Board of Inquiry's preliminary rulings on 13 January 1995, and the case resumed before me on 19 January 1995. At that time, respondents' counsel made an additional preliminary motion, which took a full day in argument and resulted in another preliminary ruling by this Board.

Consequently, we did not begin with the hearing on the merits until 26 January 1995, almost two full years after the initial appointment of a Board of Inquiry. The hearing on the merits has been similarly prolonged. The examination-in-chief and cross-examination of Mr. Naraine took eight days of hearing. We were unable to schedule these hearings expeditiously due to a combination of the conflicting schedules of counsel and the chair of the Board. We heard Mr. Naraine's evidence for two days in January, three days in February, two days in April, and one day in May. The Commission then called a number of other witnesses, who gave evidence in seven days of hearing scheduled in May and June. Due to the combined schedules of the chair of the Board and both counsel, we scheduled no hearing days in July.

The Board had hoped to complete this hearing in August, when the chair had a large block of time open for hearing, but due to respondents' counsel's litigation schedule, we were able to find only four available days: 2, 3, 17, and 18 of August 1995. Mr. Juriansz, one of the respondents' counsel, has stated that his timetable will not improve throughout the fall and well into the winter. Because of Mr. Juriansz's unavailability, so far we have not been able to schedule any days in September, only two days in October, two days in November, none in December and two days in January. By letter of 5 July 1995, Mr. Juriansz advised the Board that due to a conflict with the schedule for another case which will require him to appear as counsel in Edmonton, he may need to request an adjournment of the two days we had scheduled in November. Mr. Juriansz has advised that it may be possible to proceed more expeditiously if Ms. Irwin, the other lawyer representing the respondents, is able to attend in his stead. However, it is not yet clear whether Mr. Juriansz intends to appear or whether Ms. Irwin will represent the respondents in his absence. Additional days have been booked in February and March.

Obviously, this hearing is proceeding at a snail's pace, with no end in sight. Delay has been a significant issue in this case and drawing out these proceedings serves only to enhance significantly the difficulties of the situation. The consequences of the delay to the respondents and the complainant were canvassed fully in the preliminary arguments and in the preliminary rulings of this Board. The respondents have insisted that the delay has substantially hampered their ability to prepare and present a comprehensive defence. At present, the complainant, Mr. Naraine, is unemployed. An issue in this hearing is his claim to reinstatement in his previous position with the respondents' company. The protracted delay in determining Mr. Naraine's claim is not in any of the parties' interests.



## **Procedural Ruling**

In view of the many delays in setting hearing dates, a problem with no obvious end in sight, I gave an oral ruling dismissing the respondents' motion to adjourn on 2 August 1995. Boards of Inquiry have the flexibility to control their own procedure, recognizing that they must be mindful of the rules of natural justice. In my judgment, the interests of justice would be better served by proceeding with the hearing in this case. The request for an adjournment is traceable to the respondents' failure to serve Mr. Naraine with documents he was entitled to receive. Mr. Naraine waived any objection he might have to continuing the examinations-in-chief without his counsel present. In my view, there is no obvious imbalance in counsel's opportunity to prepare for cross-examination, since respondents' counsel have had the benefit of extensive and lengthy breaks in the hearing to prepare cross-examination for many of the Commission's witnesses. Counsel for the respondents conceded that the first few witnesses they planned to call would not be testifying about matters in common. Respondents' counsel was also able to make changes to the subsequent order of witnesses so as to keep each additional witness's evidence separate and discrete from the others. In my opinion, the procedural irregularity in splitting up the direct testimony of the initial witnesses from their cross-examinations is not such as to interfere with the rules of natural justice in this case.

I also advised Mr. Naraine on 3 August 1995 that he should retain counsel at the earliest opportunity and try to have his counsel present at the resumption of the hearing on 17 August 1995. I advised him that this Board would allow the splitting of testimony of the respondents' witnesses only until 18 August 1995, and that upon our scheduled resumption in October, there would be no further procedural accommodation. It should perhaps be emphasized at this point that all parties to a proceeding possess full rights to cross-examine witnesses. The substance of this right is not diminished by lack of legal representation. Throughout the proceeding Mr. Naraine is entitled to cross-examine witnesses personally, and he possesses this right even in the absence of counsel.

The hearing proceeded on August 2 and 3, over the objections of respondents' counsel. Five witnesses were called on behalf of the respondents and all gave their evidence-in-chief. At that time, respondents' counsel sought two additional rulings: that (a) the Commission counsel and Mr. Naraine's new counsel ought not to have the opportunity to use the testimony-in-chief of later witnesses in the cross-examination of earlier witnesses; and (b) that when each witness was recalled for cross-examination, respondents should be allowed the opportunity to ask further questions regarding matters that have arisen in the cross-examination of earlier witnesses. Commission

counsel opposed the motion. I deferred ruling on this motion and permitted the parties to submit written argument on the matter during the break between August 3rd and our scheduled resumption on 17 August 1995. Although, in view of the ruling I have ultimately made in this matter, it is not necessary to make a final decision on this motion, it is my opinion that the suggestion made by respondents' counsel is an unwieldy one, that would lend an air of artificiality to the questioning of witnesses. I am not convinced that it would be possible, in practical terms, to enforce such an order, especially where it may be difficult to determine whether counsel's question originates from the testimony of a previous witness or from some other source.

In any event, I received correspondence from respondents' counsel, dated 4 August 1995, requesting yet again that this Board of Inquiry grant the respondents' original motion for adjournment. Respondents' counsel further noted that having considered the witnesses that they were able to call under these circumstances, they had found it might not be possible to fill both days scheduled for the remainder of August. "There are witnesses who are retired or not in the company's employ," wrote respondents' counsel. "We are reluctant to inconvenience them twice, or to require hourly employees to lose a day's pay twice." Commission counsel also filed written submissions in which she continued to argue that proceeding with the examinations-in-chief did not contravene any principles of natural justice.

It is obviously difficult, if not impossible, for a Board of Inquiry to insist upon proceeding when counsel indicates they are unable to call sufficient witnesses to fill the days scheduled for hearing. However, the situation took yet another twist prior to our scheduled resumption on 17 August 1995. Mr. Naraine apparently contacted Commission counsel to inform her that he had been unable to retain new counsel, despite stringent efforts to do so. He informed Commission counsel that he was prepared to proceed without independent counsel on 17 August 1995, and she communicated this to respondents' counsel. Both Commission and respondents' counsel proceeded as if, in the absence of counsel, Mr. Naraine was waiving his right to separate cross-examination of the respondents' witnesses. Both were prepared to proceed on that basis, and they agreed to resume the hearing with Commission counsel's cross-examination of the five witnesses who had testified-in-chief on August 2nd and 3rd.

Upon our resumption of the hearing on 17 August 1995, these plans quickly unravelled. Mr. Naraine advised the Board of his failure to retain new counsel, but noted that he was still hopeful that he would have independent representation by the time of the scheduled resumption of the hearing in

October. He also corrected the misapprehension under which counsel were labouring that he had waived his right to have his own counsel cross-examine all of the respondents' witnesses at a later date. If he is ultimately successful in retaining separate counsel by October, Mr. Naraine informed the Board that he would be seeking the opportunity for his counsel to cross-examine all five of the August witnesses.

Hearing this, respondents' counsel expressed strenuous objection to proceeding. Respondents' counsel noted that it would be most unfair to permit Commission counsel to cross-examine the five witnesses on August 17 and 18, and then adjourn until October when Mr. Naraine's counsel would be given a fresh opportunity to cross-examine them in turn again. It was one thing to split the examination-in-chief from the cross-examination, but even more problematic to split the cross-examination into two parts. Respondents' counsel argued that this would constitute a serious breach of natural justice. Commission counsel made no further submissions on this point.

Having considered the full arguments of counsel, I issued an oral ruling granting the motion for adjournment. By this point, none of the parties was actively opposing the cancellation of the two remaining days scheduled in August, to permit the complainant another opportunity to find counsel and to remedy the lack of disclosure. While this Board continues to hold grave concerns about the extraordinarily protracted nature of this hearing, there seemed to be no other alternative.

There comes a point, however, where the delays in the scheduling of a hearing become completely intolerable. I earlier advised the parties that as chair of this Board, I was available to sit continuously on this case from 6 December 1995 to 5 January 1996 (barring statutory holidays). Even allowing for some breaks during this span of dates, it should be possible to attempt to complete the hearing during this period. When this hearing resumes in October, I will again canvass the parties concerning their availability between 6 December 1995 and 5 January 1996. It is imperative that this matter begin to proceed with greater expeditiousness than it has in the past and that the respondents and complainant address the balancing of issues of adequate representation and timeliness in the conduct of this hearing. With the full cooperation of all counsel, I hope that we may make significant progress in bringing this hearing to a close.

Upon adjourning, I also advised Mr. Naraine that if he wished to retain independent legal representation, his counsel should be fully prepared to proceed when the hearing resumes in

October. If he does not have counsel who is prepared to cross-examine the respondents' witnesses in October, he will be permitted no further adjournment to retain counsel. The cross examination of the respondents' witnesses will proceed forthwith.

Date

14 Sept 95

Constance Backhouse  
Chair, Board of Inquiry